# Pelangi Sdn Bhd v Ketua Pengarah Hasil Dalam Negeri

HIGH COURT (KUALA LUMPUR) — APPLICATION FOR JUDICIAL REVIEW NO R2–25–39 OF 2011
ROHANA YUSUF J
22 AUGUST 2011

*Civil Procedure — Interest — Award, of — Discretion of court to impose interest payment with judgment sum — Whether interest may be imposed on refund of tax unlawfully retained by Inland Revenue — Civil Law Act 1956 s 11*

*Revenue Law — Income tax — Assessment — Refund — Gains arising from compulsory land acquisition wrongly subjected to income tax — Refund of unlawfully retained tax — Whether refund prohibited by s 111 of the Income Tax Act 1967 — Whether claim for refund was in nature of mandamus and cannot be granted against public authority under s 44 of the Specific Relief Act 1950 — Whether interest may be imposed on amount refunded — Civil Law Act 1956 s 11*

The respondent had subjected gains arising from a compulsory land acquisition to income tax and consequently had retained the applicant's tax refund. The applicant successfully applied for judicial review and obtained a declaration that the decision of the respondent was unlawful. Consequent to that, the applicant sought a refund of the sum of RM2,360,723.82 unlawfully retained by the respondent together with interest. The applicant contended that under s 11 of the Civil Law Act 1956 ('Act') the court was rested with discretion to order interest to be given together with judgment sum. The respondent claimed that the order sought by applicant was in the nature of mandamus and cannot be granted against the respondent being a public authority. The respondent further contended that the applicant was not entitled to be refunded as yet by virtue of s 111 of the Income Tax Act 1967 ('ITA').

**Held**, allowing the applicant's application with costs:

(1) The prayer for interest was consequent to the unlawful imposition of tax on the appellant by the respondent. The respondent was unlawfully imposing the assessment because it did not follow the law as established in *Ketua Pengarah Hasil Dalam Negeri v Penang Realty Sdn Bhd* [2006] 3 MLJ 597; [2006] 2 CLJ 835. Thus the declaration sought was consequential to the declaration that the order of the respondent was unlawful. Following that the respondent would have to refund the sum paid with interest. The prayer for refund here was not in the nature of

compelling the respondent to do any act envisaged under s 44 of the Specific Relief Act 1950 (see paras 6–7). A

(2) The court is vested with discretion to impose interest payment as compensation and it is provided for under s 11 of the Act; *Lim Eng Kay v Jaafar bin Mohamed Said* [1982] 2 MLJ 156; *Lee Guan Par v Hotel Universal Sdn Bhd* [2005] 4 MLJ 589; [2005] 3 CLJ 1; *Mirra Sdn Bhd v The Ayer Molek Rubber Company Bhd* [2008] 2 MLJ 348 referred (see para 8). B

(3) Revenue's reliance on s 111 of the ITA was misplaced because s 111 specifically deals with an overpayment. This was not a case of an overpayment. There was no basis in law for the payment made by the applicant here in the first place (see para 10). C

**[Bahasa Malaysia summary**

Responden telah mensubjekkan keuntungan yang berbangkit daripada pengambilan tanah secara paksa kepada cukai pendapatan dan oleh itu telah menahan bayaran balik cukai pemohon. Pemohon berjaya memohon untuk semakan kehakiman dan memperolehi perisytiharan bahawa keputusan responden menyalahi undang-undang. Oleh itu, pemohon memohon pembayaran balik wang sejumlah RM2,360,723.82 yang secara tidak sah ditahan oleh responden bersama dengan faedah. Pemohon berhujah bahawa di bawah s 11 Akta Undang-Undang Sivil 1956 ('Akta') mahkamah mempunyai budi bicara untuk memerintahkan faedah diberikan bersama dengan jumlah penghakiman. Responden mendakwa perintah yang dipohon oleh pemohon adalah bersifat mandamus dan tidak boleh dibenarkan terhadap responden sebagai pihak penguasa awam. Responden selanjutnya berhujah bahawa pemohon belum berhak dibayar balik berikutan s 111 Akta Cukai Pendapatan 1967 ('ACP'). D E F

**Diputuskan**, membenarkan permohonan perayu dengan kos: G

(1) Permohonan untuk faedah adalah akibat kepada pengenaan cukai yang salah di sisi undang-undang ke atas perayu oleh responden. Responden secara tidak sah mengenakan taksiran kerana ia tidak mengikut undang-undang seperti yang ditetapkan di dalam kes *Ketua Pengarah Hasil Dalam Negeri v Penang Realty Sdn Bhd* [2006] 3 MLJ 597; [2006] 2 CLJ 835. Oleh itu perisytiharan yang dipohon adalah penting kepada perisytiharan bahawa perintah yang dibuat oleh responden adalah menyalahi undang-undang. Berikutan itu responden mestilah membayar balik jumlah yang dibayar dengan faedah. Permohonan untuk bayaran balik di sini bukan bersifat memaksa responden untuk membuat apa-apa tindakan yang dibayangkan di bawah s 44 Akta Relief Spesifik 1950 (lihat perenggan 6–7). H I

(2) Mahkamah diletakhakkan dengan budi bicara untuk mengenakan

bayaran faedah sebagai pampasan dan ia diperuntukkan di bawah s 11 Akta (lihat perenggan); *Lim Eng Kay v Jaafar bin Mohamed Said* [1982] 2 MLJ 156; *Lee Guan Par v Hotel Universal Sdn Bhd* [2005] 4 MLJ 589; [2005] 3 CLJ 1; *Mirra Sdn Bhd v The Ayer Molek Rubber Company Bhd* [2008] 2 MLJ 348 dirujuk (lihat perenggan 8).

(3) Penggantungan hasil berdasarkan s 111 ACP adalah disalahletakkan kerana s 111 berurusan secara khusus dengan lebih bayaran. Ini bukanlah kes lebih bayaran. Tiada asas dari segi undang-undang untuk bayaran dibuat oleh pemohon di sini dari mulanya (lihat perenggan 10).]

**Notes**

For cases on income tax in general, see 10 *Mallal's Digest* (4th Ed, 2011 Reissue) paras 2312–2690.

For cases on interest in general, see 2(2) *Mallal's Digest* (4th Ed, 2010 Reissue) paras 3955–4021.

**Cases referred to**

*Benedetti v Sawiris and Ors* [2010] EWCA Civ 1427, CA (refd)

*Director General of Inland Revenue v Ooi Guan Hoe* [1986] 2 MLJ 385 (refd)

*Grincelis v House* (2000) 173 ALR 564, HC (refd)

*Jaggar v Lyttelton Marina Holdings Ltd (in Receivership)* [2006] 2 NZLR 87, HC (refd)

*Karpal Singh a/l Ram Singh v DP Vijandran* [2003] 2 MLJ 385, FC (refd)

*Ketua Pengarah Hasil Dalam Negeri v Penang Realty Sdn Bhd* [2006] 3 MLJ 597; [2006] 2 CLJ 835, CA (refd)

*Koh Siew Keng (p) & Anor v Kok Heng Jin* [2008] 3 MLJ 822; [2008] 3 CLJ 450, CA (refd)

*Kon Thean Soong v Tan Eng Nam* [1982] 1 MLJ 323; [1982] CLJ (Rep) 149, FC (refd)

*Lee Guan Par v Hotel Universal Sdn Bhd* [2005] 4 MLJ 589; [2005] 3 CLJ 1, CA (refd)

*Lim Eng Kay v Jaafar bin Mohamed Said* [1982] 2 MLJ 156, FC (refd)

*Lower Perak Co-operative Housing Society Bhd v Ketua Pengarah Hasil Dalam Negeri* [1994] 2 MLJ 713; [1994] 3 CLJ 540, SC (refd)

*Mangalore Chemicals & Fertilisers Ltd v Deputy Commissioner of Commercial Taxes* 1992 (4) KarLJ 760, SC (refd)

*Mirra Sdn Bhd v The Ayer Molek Rubber Company Bhd* [2008] 2 MLJ 348, CA (refd)

*Woolwich Equitable Building Society v Inland Revenue Commissioners (No 2)* [1992] 3 All ER 737, HL (refd)

**Legislation referred to**

Civil Law Act 1956 s 11

Federal Constitution arts 13, 96

Income Tax Act 1967 ss 97, 103(1), 111
Specific Relief Act 1950 s 44

*DP Naban (S Saravana Kumar with him) (Lee Hishamuddin Allen & Gledhill) for the applicant.*
*Ahmad Ishak bin Hassan (Seri Hanim bt Ayub with him) (Legal officer of the Inland Revenue Board) for the respondent.*

**Rohana Yusuf J:**

**[1]** The applicant in encl 1 successfully applied for a judicial review seeking for declaration which in effect made the decision of the respondent to be unlawful since it does not follow the law. Consequent to that, the applicant sought for a refund of the sum of RM2,360,723.82 unlawfully retained, by the respondent together with interest.

**[2]** The applicant contended that under s 11 of the Civil Law Act 1956 the court is rested with discretion to order interest to be given together with judgement sum. Interest according to the applicant has been awarded by the Federal Court in *Lim Eng Kay v Jaafar bin Mohamed Said* [1982] 2 MLJ 156 on the basis of compensating for deprivation of the use of money. This is also the position in *Karpal Singh a/l Ram Singh v DP Vijandran* [2003] 2 MLJ 385 (see also English decision in *Benedetti v Sawiris and Ors* [2010] EWCA Civ 1427, *Mangalore Chemicals & Fertilisers Ltd v Deputy Commissioner of Commercial Taxes* 1992 (4) KarLJ 760 and D Cruiser of Commercial Tax, and case of *Jaggar v Lyttelton Marina Holdings Ltd (in Receivership) 1992 New Zeal* [2006] 2 NZLR 87).

**[3]** The English case of *Woolwich Equitable Building Society v Inland Revenue Commissioners (No 2)* [1992] 3 All ER 737 is a landmark ruling by House of Lords which upheld a tax payer's entitlement to interest on sums repaid by revenue to tax payer. In that case the court also relied on the concept of unjust enrichment, which was accepted by our Court of Appeal in *Koh Siew Keng & Anor v Kok Heng Jin* [2008] 3 MLJ 822; [2008] 3 CLJ 450. The applicant also relied on art 13 as well as art 96, which states that tax can only be levied under the authority of law.

**[4]** As regards the date of interest payable, the applicant relied on *Kon Thean Soong (p) v Tan Eng Nam* [1982] 1 MLJ 323; [1982] CLJ (Rep) 149 a decision of the Federal Court which takes the view that it should run from the date the applicant in that case had the use of the money.

**[5]** For the respondent it was contended that the order sought by applicant is in the nature of mandamus and cannot be granted against the respondent being

a public authority. There is no written law imposing this duty on the respondent to refund with interest and a writ of mandamus cannot be, made by the court against the respondent. The respondent further, contended that the applicant is not entitled to be refunded as yet by virtue of s 111 of the Income Tax Act 1967 ('ITA'). This section empowers the director general to refund an over payment, 30 days of being notified on the amount of appeal to the Special Commissioners of Income Tax. Further under s 111(1A) the respondent cannot be compelled to refund until the excess in respect of assessment is finally determined under s 97, that is until the party has reached a stage where there is no further appeal. In this case the party has a right of further, appeal to the Court of Appeal. The respondent relied on *Director general of Inland Revenue v Ooi Guan Hoe* [1986] 2 MLJ 385. Furthermore, the applicant cannot be said to be deprived of use of the money paid because the taxpayer had to comply with assessment issued. Once issued it is payable and recoverable as debt under s 103(1) of the ITA.

FINDINGS

**[6]** I have considered the argument of both counsel on the issue of interest. First, it is important to determine whether the basis of interest claimed by the applicant tentamount to an order of mandamus under s 44 of the Specific Relief Act 1950. It is clear from the application of the applicant that the prayer for interest is consequent to the unlawful imposition of tax on it by the respondent, which this court based on the another decision of similar facts has allowed. It was also the findings of this court that the respondent is unlawfully imposing the assessment because it does not follow the law as established in the *Penang Realty* case.

**[7]** Thus the declaration sought is consequential to the declaration that the order of the respondent was unlawful. Following that the respondent would have to refund the sum paid with interest. Thus, I do not agree that the prayer for refund here is in the nature of compelling the respondent to do any act envisaged under s 44 of the Specific Relief Act 1950.

**[8]** Cases cited by learned counsel for applicant are clear that the court is vested with discretion to impose interest payment as compensation and it is provided for under s 11 of the Civil Law Act 1956. This position was affirmed in the Federal Court decision of *Lim Eng Kay* and Court of Appeal decision in *Lee Guan Par, v Hotel Universal Sdn Bhd* [2005] 4 MLJ 589; [2005] 3 CLJ 1 (see also *Mirra Sdn Bhd v The Ayer Molek Rubber Company Bhd* [2008] 2 MLJ 348). Interest is awarded in the nature of compensation to remedy the aggrieved party whose money has been unlawfully deprived by the other party.

Similar position are taken in other jurisdiction. In the English cases in *Grincelis v House* 173 ALR 564 and New Zealand *Jaggar v Lyttelton Marina Holdings Ltd (in Receivership)* [2006] 2 NZLR 87.

**[9]** In a case relating to tax, the landmark ruling in *Woolwich Equitable Building Society v Inland Revenue Commissioners (No 2)* [1992] 3 All ER 737, the House of Lords allowed taxpayer interest on the sums repaid by revenue from dates of payment by taxpayer. In the same case the court observed that the position of revenue in such a situation, which is conferred with coercive power of the state, having the benefit of a massive interest free loan as fruit of an unlawful action. The law Lords also relied on the concept of unjust enrichment or unjust benefit, in awarding interest to the tax payer. Lord Slynn observed in the case that the citizen has a right to recover from the revenue money demanded and paid which was not due because the demand was ultra vires. He found it unacceptable to deny a tax payer of interest when the tax payer paid large sums of money to the revenue based on invalid regulations and retained free of interest, pending a court decision.

**[10]** The argument of learned counsel for revenue relying on s 111 of the ITA in my view is misplaced because s 111 specifically deals with an overpayment. It is clear that this is not a case of an overpayment. There was no basis in law for the payment made by the applicant here in the first place.

**[11]** In the present application, the respondent had in fact subjected the gains arising from the compulsory land acquisition to income tax and consequently, retaining the applicant's tax refund, which at all material times was rightful money belonging to the applicant.

**[12]** The respondent's decision is inappropriate as it ignored the decision of the Supreme Court in *Lower Perak Co-operative Housing Society Bhd v Ketua Pengarah Hasil Dalam Negeri* [1994] 2 MLJ 713; [1994] 3 CLJ 540 and concurrent decisions of this court and the Court of Appeal in *Ketua Pengarah Hasil Dalam Negeri v Penang Realty Sdn Bhd* [2006] 3 MLJ 597; [2006] 2 CLJ 835. The respondent subjected the same to income tax despite the decisions superior courts were brought to its attention. The act of the respondent here has kept the applicant out of money amounting to RM2,360,723.82 which ought to have been refunded to the applicant, since the respondent has had the use of the money, the respondent ought to compensate the applicant accordingly.

**[13]** Thus based on all these reasons I allow the application by the applicant

be paid an interest of 4% on the refund amount of RM2,360,723.82 to take effect from 4 January 2011 together with costs of RM3,000.

*Applicant's application allowed with costs.*

Reported by Kanesh Sundrum